

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Programs Coordination
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Subject: Guidance Memo No. 03-2006 - Permitting ISTEA Exempted Municipally Owned Industrial Activity Storm Water Discharges

To: Regional Directors

From: Larry G. Lawson, P.E., Director 

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Copies: Regional Permit Managers, Regional Water Permit Managers, Regional Compliance and Enforcement Managers, Martin G. Ferguson, Kathleen O'Connell, OWPP Staff

Summary:

The federal storm water regulations were published by EPA in 2 phases. The Phase 1 regulation was published on November 16, 1990, and established permit application requirements for storm water discharges associated with industrial activity.

On April 2, 1992, EPA published a Federal Register notice which codified several provisions of Section 1068 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) into the NPDES regulations. The ISTEA rule temporarily exempted Phase 1 industrial activity storm water discharges owned or operated by municipalities with populations less than 100,000 from the storm water permitting requirements, with the exception of power plants, airports, and uncontrolled sanitary landfills (defined as those not meeting the runoff/runoff requirements of Subtitle D of RCRA). Congress delayed the permitting deadline for these facilities to allow small municipalities additional time to comply with the NPDES requirements.

The Phase 2 regulation was published on December 8, 1999, and ended the ISTEA exemption. The regulation set a deadline of March 10, 2003, for all ISTEA-exempted municipally owned or operated industrial activities to apply for permit coverage. After that date, all regulated industrial activities and construction projects must comply with the NPDES storm water permitting requirements, regardless of whether the activity is publicly or privately owned. The purpose of this document is to provide guidance to the Regional Offices for the permitting of ISTEA exempted facilities.

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Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, It does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

Permitting ISTEA Exempted Municipally Owned Industrial Activity Storm Water Discharges

Introduction

EPA's storm water regulations were published in 2 phases. Phase 1 of the program began on November 16, 1990, when EPA published the Storm Water Regulation; Final Rule (55 FR 47990). This regulation established permit application requirements for storm water discharges associated with industrial activity.

On April 2, 1992, EPA published a Federal Register notice (57 FR 11394) which codified several provisions of Section 1068 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) into the NPDES regulations. The ISTEA rule temporarily exempted Phase 1 industrial activity storm water discharges owned or operated by municipalities with populations less than 100,000 from the storm water permitting requirements, with the exception of power plants, airports, and uncontrolled sanitary landfills (defined as those not meeting the runoff requirements of Subtitle D of RCRA). Congress delayed the permitting deadline for these facilities to allow small municipalities additional time to comply with the NPDES requirements.

The Phase 2 Storm Water Regulation, Final Rule, which was published on December 8, 1999 (64 FR 68722), ended this temporary exemption, and set a deadline of no later than March 10, 2003, for all ISTEA-exempted municipally owned or operated industrial activities to apply for permit coverage. After March 10, 2003, all industrial activities and construction projects must comply with the NPDES storm water permit requirements, regardless of whether the activity is publicly or privately owned.

The purpose of this document is to provide guidance to the Regional Offices for the permitting of ISTEA exempted facilities.

Industrial Activities

Many small communities (cities, counties, incorporated towns) are unfamiliar with the Phase 1 storm water permitting requirements for industrial activities and construction sites. Applications might be submitted from localities for any of the eleven categories of industrial activity (see Attachment A), but the majority of the applications will probably come from the following categories:

Storm Water Discharge Associated With Industrial Activity

- **Category 5 - Landfills**, *land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from facilities in any of the 11 industrial activity categories) including those that are subject to regulation under subtitle D of RCRA.*

The regulation applies to both open and closed landfills. If the landfill has received wastes from any of the 11 industrial activity categories, including construction debris and waste, then they are required to be permitted. If they have received only domestic waste, they are not required to be permitted.

An inactive, closed or capped landfill is no longer subject to storm water permit application requirements when the land use has been altered such that there is no exposure of significant materials to storm water at the site. For example, if an impervious surface (such as a parking lot or shopping center) now covers the closed landfill, the storm water discharges from the area are no longer associated with the previous landfill activity. The DEQ Regional Offices will need to make these determinations on a case-by-case basis.

If a landfill is properly closed and capped, but the land use has not been changed (i.e., they are still subject to storm water permit application requirements), they may qualify for "no exposure" certification, and be released from the permitting requirements altogether. No exposure certifications may be submitted at any time, but for the ISTEA exempted facilities, the locality must either submit a no exposure certification or a permit application by March 10, 2003.

- **Category 8 - Transportation facilities** *classified as Standard Industrial Classifications 40, 41, 42 (except 4221 - 25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, airport deicing operations, or which are otherwise identified under one of the other industrial activity categories, are associated with industrial activity.*

For municipal maintenance facilities, the Regional Offices may have to help the locality to determine if a permit application is necessary. The "primary" SIC code for the facility (based on the primary activity taking place) would determine the applicability of the regulations.

The SIC Manual recommends using a value of receipts or revenues approach to determine what type of vehicle a particular maintenance facility is primarily engaged in servicing. For example, if a maintenance facility services both school buses and inter-city buses, the facility would total receipts for each type of vehicle and whichever generated the most revenue, would be the vehicle type that the facility is primarily engaged in servicing. If data on revenues and receipts are not available, the number of vehicles and frequency of service may be compared. If a facility services more than two types of vehicles, whichever type generates the most (not necessarily greater than half of the total) revenue, or is most frequently serviced, is the vehicle type the facility is primarily engaged in servicing.

Municipally owned and/or operated school bus maintenance facilities are not required to apply for a VPDES permit. The SIC Manual states that "school bus establishments operated by educational institutions should be treated as auxiliaries" to the educational institution. Since the SIC code assigned to educational institutions is 82, the municipally operated (i.e., by a school board, district, or other municipal entity) school bus establishments would not be required to apply for a VPDES permit for their storm water discharges. Private contract school bus services are required to apply for a VPDES permit for their storm water discharges.

A municipal maintenance facility that is primarily engaged in servicing garbage trucks may be required to apply for a permit, depending on the SIC code assigned to the establishment. If the municipality also owns the disposal facility (e.g., landfill, incinerator) that receives refuse transported by the trucks, then the maintenance facility would be classified as SIC code 4953 and thus would not be required to apply for a permit unless the maintenance facility was located at a facility covered under one of the other categories of industrial activity (e.g., a landfill that receives industrial waste). If, however, the municipality does not own the disposal facility, the truck maintenance facility would be classified as SIC code 4212 and thus would be required to apply for a permit. If other vehicles are serviced at the same maintenance facility, the facility may not be required to submit a permit application, depending on what the primary maintenance activity is at the facility.

The operation of fire trucks, police cars and ambulance/emergency vehicles is classified under public order and safety (SIC code 92); therefore, the operator of a facility primarily engaged in servicing those vehicles would not be required to apply for a permit.

No exposure certification may also be an option at many maintenance facilities. Again, localities must either submit a no exposure certification or a permit application by March 10, 2003, for ISTEA exempted facilities. One note regarding no exposure at maintenance facilities, parking lots used to store vehicles prior to maintenance are considered to be a component of the facility's maintenance activities, and are covered as such by the storm water regulation. A facility that stores vehicles outside prior to repair would not qualify for a no exposure exemption, unless the area is covered and entirely sheltered from storm water.

- **Category 9 - Treatment works** *treating domestic sewage or any other sewage sludge or wastewater treatment device or system, used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that are located within the confines of the facility, with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with 9 VAC 25-31-420 through 720.*

All POTWs with a design flow of 1.0 mgd or more, or required to have an approved pretreatment program, are required to be permitted. This does not affect any of the POTWs with "conditional" pretreatment programs unless we are requiring them to develop a fully "approved" program. Check with the Regional Pretreatment Coordinator for the latest list of approved and developing pretreatment POTWs.

The phrase "*including land dedicated to the disposal of sewage sludge that are located within the confines of the facility*" refers to dedicated surface sludge disposal sites that are located at an STP. The application of sludge to land to support the growth of crops is not considered by DEQ (or EPA) to be "disposal", but rather "beneficial reuse". The application of sludge to an area at an STP would usually be done as a permitted "beneficial reuse" activity, rather than as a "disposal" activity. Dedicated surface sludge disposal sites have much more stringent permitting requirements, including the installation of liners and/or monitoring wells, etc., and there probably aren't too many of these sites in the State.

The above definition specifically excludes "*farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility*". Rephrased, the definition specifically includes farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are physically located in the confines of the facility. EPA defines beneficial sludge reuse as the application of sludge as a nutrient builder or soil conditioner. Examples include agricultural or domestic application.

If the land in question is immediately adjacent to and owned by the STP it could be argued that this beneficial reuse site is located within the confines of the facility, and, therefore, would be an "industrial activity". However, the definition of industrial activity goes further to specifically exclude "*areas that are in compliance with 9 VAC 25-31-420 through 720*". Sections 9 VAC 25-31-420 through 720 are Part VI of the VPDES Permit Regulation, "Standards for the Use or Disposal of Sewage Sludge", which addresses not only land application of sludge for beneficial reuse, but also surface disposal sites.

If a site is properly permitted in accordance with Part VI of the Permit Regulation, both dedicated surface disposal sites and land used for beneficial reuse of sludge are excluded from the definition of industrial activity, even if those areas are located on or adjacent to the STP facility.

This exclusion should not apply to a sloppy composting or sludge loading area, where storm water runoff from that area just flows on to an adjacent vegetated field/lawn, unless that adjacent field/lawn constitutes an approved land application site and the runoff to that field/lawn is being monitored/limited/tracked as with any other approved land application site.

- **Category 10 - Construction activity** *including clearing, grading and excavation activities except: operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more.*

and

Storm Water Discharge Associated With Small Construction Activity - Construction activity *including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility.*

Localities must submit applications for all their construction projects that disturb one or more acres (or less than an acre if the project is part of a larger common plan of development or sale that will ultimately disturb more than one acre). Note that localities are the "plan

approving authority" for their own construction projects (Registration Statement item #12), and their project site plans/ESC Plans should be approved by their plan approval section. (If a locality ignores their own ESC requirements, DCR will come in and take action.)

Note that Industrial Activity permits are separate and distinct from MS4 permits. Many of the localities with populations under 100,000 will also be permitted under the Small MS4 Permit Program. While the Storm Water Management Program required by the small MS4 permit requires the municipality to address some of the same industrial activities (such as Minimum Measure #4, *Construction site storm water runoff control*, or Minimum Measure #6, *Pollution prevention/good housekeeping for municipal operations*), their industrial activities must still be permitted separately under the Industrial Activity Storm Water Permitting Program.

Applications and Permits

Most municipalities will apply for one of the VPDES storm water general permits for their ISTEAs exempted facilities (VAR5 for their industrial activities, and VAR10 for their construction sites). If a municipality has an individual VPDES permit for process wastewater discharges at an ISTEAs exempted facility (e.g., a permit for a POTW), the storm water permit requirements could be incorporated into that permit. This would require the municipality to either request a modification to their existing individual permit, or if the permit is up for reissuance, to include the Storm Water Industrial Activity application form, 2F, with their application package. If the municipality's individual permit application is not due before 03/10/2003, then they should apply for the Industrial Activity Storm Water General Permit (VAR5). When their individual VPDES permit comes up for reissuance, the industrial activity permit requirements could be added at that time, and the general permit terminated.

Individual Applications and Permits

Individual applications should include EPA Forms 1 and 2F. Form 2F requires the municipality to sample a representative storm event and submit the analysis results with the application. Since our general permit application does not require storm event sampling, the Regions can waive the Form 2F application sampling requirement for the permittee.

Permit writers should follow the VPDES Permit Manual guidance when putting industrial activity storm water requirements into individual permits.

General Permits

The Industrial Activity Storm Water General Permit Regulation requires all existing facilities and new facilities that begin operation on or before 06/30/1999, to prepare and implement their Storm Water Pollution Prevention Plan (SWPPP) no later than 03/26/2000 (9 VAC 25-151-10 A 1). New facilities that begin operation after 06/30/1999, must prepare and implement the SWPPP prior to submitting the Registration Statement (9 VAC 25-151-10 A 2). What this means is that **anyone** that applies for the Industrial GP at this time should have the SWPPP prepared and implemented when they submit the registration statement. However, the regulation also allows the Director, upon a showing of good cause, to establish a later date in writing for preparing and compliance with the SWPPP (9 VAC 25-151-80 A 5).

On 11/14/2002, we met with VAMWA representatives to discuss ISTEAs exempted facilities and the storm water application and permit requirements. We told them at that time that facilities that applied for the general permit would have up to 270 days after the permit was issued to prepare and implement the SWPPP. VAMWA passed this information on to its membership.

After extensive discussions internally and with the Regions in January, 2003, we determined that what we had told VAMWA was in error, and that the SWPPP needs to be prepared and implemented at the time of the GP Registration Statement submittal. We let VAMWA know this in late January, but they had already sent the original incorrect information to their members.

In response to all of this, VAMWA has prepared a form letter that they have distributed to their members that requests an extension of the time to develop and implement the SWPPP until 12/10/2003*(*...at least that is the date we suggested they use). We believe this is a reasonable request and that "good cause" exists to extend the date, due to the fact that we initially told them incorrect information.

We may also get other requests (in forms other than the VAMWA form letter) to extend the SWPPP development and implement date. These should be evaluated by the Region on a case-by-case basis. "Good cause" is a subjective term, and we would suggest that the Regions adopt a very broad interpretation.

GP Monitoring and DMRs

Questions have come up recently relative to the permit monitoring requirements. Permittees want to know if they have to do Analytical Monitoring this year, since it is the 4th year since the permit was originally issued. The regulation requires the permittee to do Analytical Monitoring in the 2nd and 4th years *after the date of coverage* under the permit. Therefore, monitoring for these folks would not kick in until next year. Next year at this time there will only be a few months left until the permit expires, so our interpretation is that the permittee would not be required to monitor for that partial year period. Monitoring requirements would start again when the new permit goes into effect 6/30/2004.

CATEGORIES OF FACILITIES THAT DISCHARGE STORM WATER ASSOCIATED WITH INDUSTRIAL ACTIVITY

Phase 1 Industrial Activities

- (1) Facilities subject to storm water effluent limitations guidelines, new source performance standards, or toxic pollutant effluent standards under 40 CFR Subchapter N (except facilities with toxic pollutant effluent standards which are exempted under Category 11 of this definition);
- (2) Facilities classified as Standard Industrial Classifications (SIC) 24 (except 2434), 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, and 373;
- (3) Facilities classified as SIC 10 through 14 (mineral industry) including active and inactive mining operations (except for areas of coal mining operations which have been reclaimed and the performance bond has been released by the appropriate SMCRA authority, or non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990) and oil and gas exploration, production, processing, or treatment operations with contaminated storm water discharges;
- (4) Hazardous waste treatment, storage, or disposal facilities, including those operating under interim status or a permit under subtitle C of RCRA;
- (5) Landfills, land application sites, and open dumps that receive or have received any industrial wastes (waste that is received from any of the facilities described under this definition) including those that are subject to regulation under Subtitle D of RCRA;
- (6) Facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as SIC 5015 and 5093;
- (7) Steam electric power generating facilities, including coal handling sites;
- (8) Transportation facilities classified as SIC 40, 41, 42 (except 4221-4225), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations. Only those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operation, airport deicing operation, or which are otherwise identified under Categories 1 through 7 or 9 through 11 of this definition are associated with industrial activity;
- (9) Treatment works treating domestic sewage or any other sewage sludge or wastewater treatment device or system used in the storage treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated to the disposal of sewage sludge that is located within the confines of the facility, with a design flow of 1.0 MGD or more, or required to have an approved POTW pretreatment program under the Permit Regulation. Not included are farm lands, domestic gardens or lands used for sludge management where sludge is beneficially reused and which are not physically located in the confines of the facility, or areas that are in compliance with 9 VAC 25-31-420 through 720;
- (10) Construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more;
- (11) Facilities under Standard Industrial Classifications 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221-25.

Phase 2 Industrial Activities

Small construction activity - Construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre and less than five acres. Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility.